AN INSIDER’S PERSPECTIVE ON BREXIT — A CONVERSATION WITH SIR PAUL JENKINS QC

EXECUTIVE SUMMARY


Sir Paul is the ultimate government insider. Until recently, he was the senior most lawyer for the British government, having served as an adviser to three consecutive prime ministers: Tony Blair, Gordon Brown, and David Cameron.

Five key insights from Sir Paul’s conversation with Angela Kerek, a finance partner in Morrison & Foerster’s Berlin office, and Paul Friedman, Morrison & Foerster’s managing partner for Europe:

1. Theresa May and Phillip Hammond are a “powerful double act”. The UK officials leading the Brexit process are on a steep learning curve.

2. Angela Merkel will play a pivotal role representing the EU’s interest in negotiating the UK’s withdrawal.

3. In its upcoming general election, France may vote to “Frexit” from the EU. A similar referendum to leave the EU could be introduced in the Netherlands.

4. SoftBank’s acquisition of ARM was a significant transaction in post-Brexit Britain and continues to create buzz about British ministers.

5. In the long term, businesses could encounter a lighter regulatory environment in the UK.
What’s the Significance of the EU for the UK?

Angela Kerek — Brexit is a bit like a big merger or a divorce after a very long marriage — in fact, probably the largest merger or divorce we have ever seen. Let’s remind ourselves and our audience what the EU is and why it’s so important to Britain.

Paul Jenkins — The European Union is a political and economic union. It is in part a free-trade area with aspirations of a forever-closer union, so it’s a journey toward federalism.

The EU has grown from the 1950s when it was six members. Britain joined in 1973. There are now 28 members. The last major expansion was when many of the countries that were part of the former Soviet bloc joined.

It does no harm to remind ourselves of the two most immutable elements of the European Union.

The first is that the EU is built around four freedoms. The EU’s immutable DNA includes the freedoms of capital, people, services, and goods.

The second point to remember — which is quite often difficult for audiences who don’t understand European law to grasp — is that it involves a complete surrender of sovereignty to the European Union in areas where the European Union has competency to deal with a given matter. That means, for example, that as long as the UK is a member of the European Union, we cannot, for instance, conclude a trade deal with a third country. Only the European Union can do that.

The only other point I’d make about the history — and it’s relevant to your divorce point, Angela — is that we’ve been a member for over 40 years. One of the obligations of being a member of the European Union is that you have to implement EU law domestically. I would say 30 to 40 percent of UK law is European law. In the divorce, sorting that out is going to be far harder than sorting out two ends of a CD collection.

So, why is the EU important to the UK? Two reasons, really. First, the European Union is by far our largest trading partner, simple as that. Second, in these difficult times, it is our key partner in security against corporate terrorism. So, in dealing with the divorce and dealing
with Brexit, it’s going to very important that we do all that we can to preserve the trading relationship and do nothing to undermine the security relationship.

Doom to Boom…and Back Again?

**Paul Friedman** – For the few months after the Brexit vote, it was largely doom and gloom. The pound plunged. Deals mostly stopped. There were predictions of a recession as early as this summer. Now it seems doom to boom. More recently, the pound is rebounding. There’s been a blockbuster acquisition, strong economic reports in Britain, greater optimism. This is what *The Wall Street Journal* referred to as the swings in mood in the UK, in Europe, and elsewhere.

Are these swings in mood based on reality? On shifting sentiments? Will we have more swings up and down in the months and years to come? Are these types of swings, back and forth, from doom to boom, the new normal?

**Paul Jenkins** – I think they are and will be for a really quite long time. Look at the process that we’re just now embarking on — a process that is a complete mystery to everyone, but my best assessment is that it will take two years now once we give notice of our intent — formal notice to withdraw from the European Union.

We first will spend two years concluding a high-level deal with the 27 other members of the European Union. We’ll then have a transitional period of another two to five years.

If you want to know what Britain’s place is going to be in the new order of things, we won’t know for sure for 10 years. During that period, there are bound to be wide mood swings.

I think the most difficult period for people in business will be the first two years. That’s when the heart of the deal will be done, but the final outcome is unlikely to emerge until right at the last minute.

**Paul Friedman** – So you’re saying that during that negotiation period, during that two years, there won’t be real transparency into the shape of a deal?

**Paul Jenkins** – It’s one of the issues people are talking about at the moment — half-light and half-transparency, and to some extent the idea of having a negotiation where you have 27 governments negotiating with one. You also have the European Union Parliament involved and the European Commission, which is another institution of the European Union. There’s going to be a lot of posturing by everyone.

Under Article 50, which is the Brexit process, unless it’s extended by unanimous agreement, you get two years. Brussels negotiators are famous for stopping the clock when they have fixed deadlines. I’d put money on the last minute of the last hour of two years, lasting several days. That’s when the call, the real guts of the deal will emerge.
Paul Friedman – In the news this morning, the House of Lords Constitutional Committee’s Report on Article 50 concludes that it would be “constitutionally inappropriate” for Prime Minister May to invoke Article 50 without first obtaining the approval of both Houses of Parliament. Brexit Secretary Davis quickly shot that down. Who’s right?

Paul Jenkins – For what it’s worth, I think David Davis is more likely to be right than the House of Lord’s Collect Committee, but I wouldn’t put a lot of money on that. I think it’s a pretty finely balanced argument. I don’t imagine that it will be hugely interesting for our audience for me to go into a great long sermon about the joys of the royal prerogative, which is actually what we’re talking about. Essentially, it comes down to a question of English domestic law. Does our constitution allow the government to push the exit button, or does it require a vote or bill in the British parliament? That is a court case that’s about to start. It will be heard in the high court in London in October. My understanding is that it will go to the Supreme Court to take a final decision, and that hearing is planned for the end of the year. So my best guess is we will get a result by the end of the year, leaving the government free, if the government wins, to push the Article 50 button at some point in January, February, or March.

Negotiating the UK’s Exit: The British Team

Paul Friedman – Let’s switch gears and talk about the negotiation process. Who are the key players? Is the Prime Minister calling the shots on all the key decisions?

Paul Jenkins – Britain has a new prime minister, Theresa May. She’s calm, shrewd, and tough. She’s realistic. She listens to advice and has been decisive. She’s got sound judgment. She’s different from Prime Minister Cameron in so many ways. She has few political friends and some enemies, and her style at the moment is very controlling. For example, all ministers are told at the moment that they’re not allowed to talk to the media without first getting permission from her office at 10 Downing Street. She’s been very firm in slapping down some of her ministers who have spoken in ways that she thinks are wrong or inappropriate about Brexit. She will not want her legacy to be only Brexit. That’s a bit optimistic. But she will want Brexit to be a success.

The other point to remember is that she was our home secretary since 2010. She has very, very strong views on migration. Given that the core of the deal will be a trade-off between access to a single market and controls on migration, we can’t expect her to be going too soft on the migration part of that deal.

The second person on the government side who is often overlooked is Phillip Hammond, who is our treasury secretary. He’s quiet, very well liked, and a sound player.

I think Hammond and May are potentially really quite a powerful double act, and they need to be. She’s brought three of the leading campaigners against staying in the European Union
— “Free Brexiteers” as they’re called — into the government and put them into absolutely pivotal positions with responsibility for delivering Brexit. She knows how incredibly difficult that will be. She knows that none of those three thought it was difficult, and that they’re on a hideous learning curve at the moment. She knows that they — almost more than anyone else — have to make this a success. They’re the ones who wanted it.

Let’s focus on those three for second. David Davis is the minister in charge of Brexit — except when I say that, of course, Theresa May is in charge. Davis is sincere. He believed it was a very straightforward process, and I think he genuinely believed leaving was a very straightforward process. Everything I pick up back in my former patch in Whitehall is that he is on the most terrifying steep learning curve, but that he’s going along it; he’s listening, he’s absorbing. He gave a performance yesterday in front of the Foreign Affairs Select Committee that drew on the SoftBank ARM deal as an example of how things would be all right, but it was quite clear that he was beginning to understand what a profoundly difficult job this is.

He’s got one of the real stars of Whitehall in his permanent secretary and his head of the department — a former colleague of mine, the former head of Blair’s private office, a real star who is supposedly there to guard the prime minister’s interests, and to monitor David Davis and make sure he doesn’t misstep.

We then have Liam Fox, who’s in charge of international trade. He’s someone who had resigned from government because of some really quite bad judgment calls. There’s no particular suggestion that his judgment is sound even now. He, by all accounts, isn’t getting how difficult it is. He’s supposed to be doing the trade stuff, and he’s going around the world saying, “I had a really good meeting with the Australians. We’re going to get a trade deal.” We can’t begin to do a trade deal with anyone, among the Australians, for two to five years, and just because they say warm words doesn’t mean we’re going to get it. I think he’s likely to be the first Brexit martyr. I think he will get this wrong at some point. He will leave office, and then he will be back with Theresa May’s biggest domestic problem, which is that comparatively small group of her party within the House of Commons who are passionately against any concessions on Brexit. They want the UK out. They want us to be a free trade area, low-tax, offshore island. That isn’t going to happen, but that’s what they’re campaigning for.

People probably want me to mention Boris Johnson, who is our foreign secretary and a larger-than-life character. I think the only thing one could say about him, again, in terms of Whitehall inwardness, is he will never give up his aspirations to be prime minister. Theresa May, as prime minister, wants him in the tent for as long as possible. Once he’s outside the tent, he’ll be on maneuvers trying to become prime minister again. So, he’ll get things wrong. He’ll make terrible faux pas, and it’ll be interesting to see how long Theresa May puts up with his mistakes rather than sack him. I suspect eventually he will push her to sack him because he needs to be on the outside.
Finally, on Westminster, very briefly, there is no opposition. The opposition is the Labour Party. Our Socialist Party is a busted flush as far as the opposition is concerned.

**Paul Friedman** – So, the court case should come to a head by the end of the year, and your thinking is that the trigger will be pulled early at 2017, is that right?

**Paul Jenkins** – I think that’s right. Logically, the UK should wait as long as possible. Once the Article 50 button is pushed, the negotiating dynamic shifts decisively in favor of the 27 and against us. So the longer we can put it off, the better.

But there are two pressures on our government to get on with this. First, our colleagues amongst the 27 don’t want us to stop. They don’t want us to be hanging around; they want to get on with this. They’ve accepted — as we have to accept — that we’re leaving. They want to stop this getting in the way of them developing the European Union. And the second thing is the point I mentioned earlier on about Theresa May’s opposition backbenchers, who are suspicious that every delay is some cunning ploy to avoid ever leaving.

**Paul Friedman** – What exactly is being done by the government, by the Brexit Department, to prepare for day one of the post Article 50 world?

**Paul Jenkins** – From the moment the results came through, the British Civil Service was effectively prohibited by the government — quite legitimately — from doing any preparatory work before the referendum. What they’ve been doing all summer — no holidays, nothing — is coming up with a wide range of options. The government needs to select from this menu of options what it wants its opening negotiating bid to be, and that will be informed by realistic assessment based on private soundings of people throughout Europe. That’s what the Brexit Department is doing, and they want to be as ready as they can be when they push the Article 50 button.

**Paul Friedman** – Is there any other means of exit other than Article 50?

**Paul Jenkins** – You referred earlier to the Lords’ Constitutional Committee Report that came out yesterday, which is important because the committee has a lot of varying lawyers on it. They raise the possibility of just walking away, only to dismiss it. In theory, if we walked away, we didn’t give notice, we just said, “We’re out”, there’s not much they could do about it. We would have no relationship with them — not any immediately — and the EU wouldn’t be interested in a relationship. It would be frankly insane to do that, so I think what we’ve seen very clearly is this government expressing a strong commitment to using a legitimate processes of international law — i.e., Article 50.

**The EU Team: Key Players and Strategy**

**Angela Kerek** – Let’s talk for a minute about the other side at the negotiating table. What do you think will be their main strategy in these negotiations? Who will be the key players to watch?
Paul Jenkins – Let’s deal with the key players first. The people in the driving seat under Article 50 on the other side of the table are the 20 counselors of ministers. They are the political representatives of the 27 governments. They are the domestic political representatives. They’re not representatives of the institutions of Europe, and that’s important because the politicians from member states are much more realistic and much more pragmatic than the European Commission, who will have one seat at the table, who are totally wedded to the concept of a European union and the purity of the original European vision. The European Commission will not be helpful here. The European Parliament may not be very helpful, but the people who will be the most pragmatic are the 27 led by probably the most powerful European politician in my time — presuming she survives next year’s election in Germany — Angela Merkel. I think she is absolutely the pivotal figure here.

What will be their strategy? There will be a number of issues. They won’t want to have some hideously bad divorce with Britain. It’s not really in anyone’s interest, certainly not in their interest, and it’s not in our interest. They will also want to avoid what’s called contagion. They will want to avoid giving the sense that you can just leave, stop paying your money, stop coming to the meetings, and still have all the benefits. They’ll want to do that for two reasons. First, because that’s really not how you keep a club thriving and happy, but secondly, you need to look at the domestic politics in a number of member states. Most strikingly, at the moment in France, which has its presidential election coming up next April and May, the polls are showing that, certainly in the first round, there is a risk that Marine Le Pen may win. Marine Le Pen is extremely far right and committed to a referendum to take France out of the European Union. The European Union might be able to survive us leaving. It really couldn’t survive if France left as well. That would be the end of it. We have a Dutch election — Geert Wilders, who’s another extreme right leader. So it’ll be quite a period. They’ll be playing hardball publicly whatever they’re doing privately.

In the longer term, they will want a deal that does minimum damage to the four freedoms that I mentioned earlier — a classic trade-off between freedom of trade and access to the single market versus migration. The more access to the single market we get, the higher the price we will have to pay in terms of controlling migration.

Angela Kerek – You have already mentioned Angela Merkel as one of the pivotal players in this negotiation, and you have also mentioned the elections next year in Germany and in France. What impact do you think those elections might have on the negotiations or, conversely, what impact might Brexit have on the elections?

Paul Jenkins – One of the interesting things that we saw immediately after the British decision to leave was not what a lot of European politicians feared — which is contagion and other people thinking leaving the EU is quite a good idea — but polls throughout the European Union are showing the people who have realized just what a terrifying, scary thing we’ve done and the number of people in favor of staying in the European Union. In
terms of long-term stability, no one is going to give us any leeway until they stave off the far right and the other ones who want to leave.

The Impact on Global Business

Paul Friedman – Let’s turn to the impact of Brexit on global businesses and their strategies. What advice would you give to executives, board members, and senior legal advisers in multinational companies about how they should move forward with their businesses?

Paul Jenkins – I divide the next 10 years into three periods. The period from when we push the Article 50 button until we do the final deal, the main deal, will be two years. During that period, we will know very little. Uncertainty will rule. There will then be a transitional period — another two to five years — when we will have a pretty clear idea of what the new world order is going to look like. Then in 10 years, we’ll know where we are in the great scheme of things in the UK.

So, how does that scenario play for people advising investors, people advising companies, senior legal advisers? It depends, I think, entirely on your risk appetite. What I would be doing with any client — whether it’s a general counsel or whatever — is conducting a rigorous risk analysis. I would be looking at the entirety of your business based in the United Kingdom or how far our business based somewhere else nevertheless does not engage with the United Kingdom and the markets there, and I would be looking at everywhere European law impacts. Examples might be tax, data protection, regulation, competition law, state subsidies — all sorts of things. I would look at that, and I would then do a risk analysis and say to my clients or my board, “What’s your appetite for risk?”

Take, for example, a financial services company headquartered in London that trades throughout the whole of the EU on the basis of what’s called a passporting arrangement. You’re regulated in one EU country, and you can trade throughout. If the UK leaves the European Union, and the government can’t retain those passporting rights, you will lose them. You will lose your ability to trade if you remain based in the UK. So, you probably might know whether we’re going to get that until right at the end of the two-year period. If your lead-time for moving on headquarters is a year or 18 months, you need to have a pretty heavy, pretty high appetite for risk to gamble that you might get the passporting arrangements, because if you don’t, then you’ve suddenly got a period where you can’t trade.

Angela Kerek – Do you see any countries or cities that are starting to compete for an advantage in terms of marketplace and talent?

Paul Jenkins – There is going to be a long period of uncertainty. At the end of that period, I think it is massively likely that the UK will continue to be one of the key economic powerhouses in the world, whether we’re still the fifth largest economy or possibly not, but
that would depend on economic growth elsewhere as well. So, if you’re in the market for the long term, Britain will remain a good place to be. In the short to medium term, I think companies that have a choice, companies that are presented with an investment opportunity in the UK or an investment opportunity in Germany, are more likely to take the German opportunity because it’s not riddled with uncertainty.

**Angela Kerek** – What about other countries like Poland, Luxemburg, Ireland?

**Paul Jenkins** – Ireland, I think, is the interesting one. I hear that a lot of lawyers, for example, are registering in Ireland to practice there so that, if we leave, they nevertheless have the right to freely work as lawyers. I think that over the next five years, we will see some shifts, but then it won’t be anything fundamental or radical.

**Paul Friedman** – On September 2, Japan published some very thoughtful comments about Brexit, given that it’s a stakeholder with very large investments in Britain and Europe. The need to emphasize the importance of certainty and transparency, to avoid “unpleasant surprises”, the bottom line of Japan’s paper was that they would like to see the current business environment maintained as much as possible. What were your thoughts about Japan’s white paper?

**Paul Jenkins** – I thought it was the single most impressive document I have seen produced in the whole Brexit debate from the moment we started the referendum until now. I think anyone who is interested in this topic should read it. It’s 15 pages of absolute gold, but essentially they’re asking for three things. Basically, Japan doesn’t want uncertainty. It wants to be involved in the process, and it wants a transparent process. Those are three things that Japan is not going to get. It will be a very uncertain process, as I’ve said before. There will be minimal transparency, and the idea that third states are going to be involved during the two-year process is pretty unlikely. Looking beyond those headlines, the details about what they want into the future, they want continuity of regulation, they want continuity of customs arrangements, all that sort of stuff. Thinking the long term, they’ll probably get most of it but they won’t know for a while whether they’re going to get it. I’ve been talking quite optimistically about the prospect of a deal. We shouldn’t lose complete sight of the fact that something might go horribly wrong here and we don’t get a deal, or we get a really bad deal. I think it’s less likely than not, but there is a risk of that.

**Paul Friedman** – Speaking of Japan, Morrison & Foerster was recently lead counsel to SoftBank on its acquisition of ARM, a UK company. The deal was announced and closed post-Brexit for over $30 billion in cash. The CEO of SoftBank said that Brexit was irrelevant. The lower pound was not part of the calculus. To what extent do you think that’s an important transaction?

**Paul Jenkins** – I think it is an important transaction. British ministers are talking about it publicly now. It shows that foreign investors still have great confidence in the UK, and, also, as I said earlier on, if you’re looking to the medium and long term, I think that confidence is
undoubtedly right. So if you’re investing for the long term, why wouldn’t you, particularly if it’s quite a cheap place to invest at the moment. It comes back to my favorite thing, which is risk. If the UK is going to be a more risky place than some other parts of the European Union to invest for the next two years, it’s also a good place to invest. If you’re prepared to take a bit of a gamble, why wouldn’t you do it?

Paul Friedman – Some companies will see opportunity in the risk — opportunity in the uncertainty — and will try to take advantage of the weaker pound to make purchases here.

Paul Jenkins – They might take advantage of the weak pound, but they might also think that there is a reasonable prospect that, at the end of this, there will be a slightly lighter touch regulator regime in the UK. It can’t be that much; otherwise the European Union won’t do deals with us. But we might be able to have a lighter touch regime, and that is a gamble other companies might take.

Paul Friedman – There have been some stories suggesting that the government should be more protective of UK companies, especially with the lower pound, to be more muscular, and perhaps disapproving transactions, M&A deals, to protect the crown jewels of UK business. Do you think that will happen?

Paul Jenkins – I really don’t. You saw some of this around the ARM deal. People who don’t like our place in Europe saying that if we hadn’t been in Europe, the government wouldn’t have been able to stop this, ARM would have remained a proudly British company. If governments start doing things like that, it sends a terrible signal to foreign investors, and they just stop investing, so I think it’s very unlikely that’ll happen.

Angela Kerek – What else do you think that the government might do to attract businesses? You have already mentioned that there will be some lighter touch regulations, but not so many. What, in particular, are you thinking about?

Paul Jenkins – On the positive side, depending on the deal we get, we may be able to have lighter touch regulation. The first point to make is that there will be nothing for two years. What there will — what there may be is some lightening of the regime afterwards. Look at financial services. Will there be a lightening of the financial services regime? Not significantly, because if we’ve retained something akin to passporting rights, that’s bound to depend on an equality of treatment.

We’re in a global world when it comes to data, we’re not going to suddenly turn ourselves into some sort of ludicrously over-liberal data regulators.

I think one of the things that the Brexiteers fail to grasp is that we are a global player in a global world. There’s very little room for outlier or extreme behavior these days.
The Impact on Trade and Migration

Paul Friedman – Let’s talk about trade with the rest of the world outside of Europe. During his visit to London earlier this year and again recently at the G20, President Obama stated that if Brexit were to pass — and now that it has — Britain would have to wait its turn in the queue for a trade agreement with the United States. He’s indicated on both occasions that it could be as much as 10 years from now. Other commentators have recently said the same thing, at least a decade to compete trade deals with the United States and China. Could you please comment on that?

Paul Jenkins – I think President Obama is almost certainly right. No one is going to do a trade deal with the UK — no one can do a trade deal with the UK until we’ve left the European Union. No one will do a trade deal with the UK until they know what the terms of trade are between us and the European Union. We will leave in two years, if it all goes according to plan. We may not know the terms of our trade deal until that transitional period I’ve been talking about, so another two to five. So it may be longer than that before we know what the arrangement is. Only then will we be able to have sensible talks with third countries, whether it’s the United States, China, Japan, or India.

Paul Friedman – Migration had a great deal to do with Brexit. At the end of the day, will freedom of movement for workers to and from Britain, or to and from Europe and Britain, remain intact?

Paul Jenkins – Not completely in the pure total freedom that we have at the moment. It was too much an issue at the heart of the referendum. The strong sense that, somehow, we weren’t in control of our borders, and that we were being swamped, to use the pejorative word that was regularly used. I think what we will see is a deal that, as I said, trades a bit of constraint on our access to the single market, particularly of inbound services, in exchange for the ability to control migration to some extent.

Where that deal falls is really difficult to predict. What I think the British government will want to be able to say at the end of the day is that we have taken back control of migration. We are determining who comes, which means we’ll get more people from the Indian subcontinent, from China, from Japan, maybe even more Americans coming to work here. Maybe slightly fewer from the 27, but Britain needs foreign workers, whether it’s at one end of the skill spectrum, to pick our fruit and our crops, up through to the other end of the spectrum, or the sort of people you employ here at Morrison & Foerster. You need the brightest and best from around the world, and I think we’ll still get them.
MOFO BREXIT BRIEFING

BREXIT TASK FORCE

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A dedicated resource center includes timely briefings examining the legal implications of Brexit on competition, privacy and data security, trademark, intellectual property, and tax issues, as well as the significance for emerging companies and the technology, media, and telecommunications sector.